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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL RATLIFF,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "relevant conduct" provision of the United States Sentencing Guidelines should have been interpreted to permit a substantial enhancement in the petitioner's sentence for his two street level sales of small quantities of cocaine, based on the petitioner's alleged participation in a conspiracy involving the purchase and distribution of large quantities of drugs that ended prior to the two sales.

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No. _____

IN THE

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OCTOBER TERM, 1994

MICHAEL RATLIFF,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Michael Ratliff ("Ratliff") prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in *United States v. Ratliff*, on December 7, 1994.

OPINIONS BELOW

The Seventh Circuit issued an unpublished order which is reprinted in the Appendix ("A") hereto at A1. The unpublished sentencing order of the district court is reprinted at A9.

JURISDICTION

The judgment of the Seventh Circuit was entered on December 7, 1994, affirming the judgment of the United States District Court for the Central District of Illinois. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves United States Sentencing Guideline § 1B1.3, which provides, in part, as follows:

§ 1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction[.]

STATEMENT OF THE CASE

On April 28, 1992, as part of a "reverse buy" sting operation, agents of the United States Drug Enforcement Agency ("DEA") arrested three individuals who appeared at a Best Western Inn hotel room in Springfield, Illinois and attempted to purchase one kilogram of cocaine. While these arrests were taking place, DEA agents stopped Petitioner Michael Ratliff as he was driving through the parking lot of the hotel. A search of his car failed to produce any contraband, and he was thereafter released.

Kent Wallace, one of the individuals arrested upstairs at the Best Western Inn, later told the authorities that Ratliff remained in the parking lot during the contemplated cocaine purchase for "security and protection purposes." Wallace further explained that he had supplied the petitioner with approximately 1.425 kilograms of cocaine between late 1991 and April of 1992.

On May 21, 1992, a DEA informant met with Ratliff at a local housing project and inquired as to whether Ratliff had any crack cocaine for sale. This meeting ultimately resulted in the informant's purchase of 4.06 grams of crack cocaine from the petitioner. It also led to another such transaction five days later, in which Ratliff sold the informant 7.83 grams of crack cocaine.

Ratliff was subsequently charged in a four count indictment with violating the federal narcotics laws. The first two counts related to Ratliff's association with Wallace and the attempted cocaine buy at the Best Western Inn. Specifically, Count I charged that Ratliff conspired with Kent Wallace and others to distribute controlled substances, including cocaine and cocaine base, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A). Count II charged that, on or about April 28, 1992, Ratliff attempted to possess with the intent to distribute cocaine, a violation of 21 U.S.C. §§ 846, 841(b)(1)(B), and 841(a)(1).

The second two counts related to Ratliff's subsequent crack cocaine sales to the DEA informant. Count III charged that, on or about May 21, 1992, Ratliff distributed cocaine base, in violation of 21 U.S.C. § 841(a)(1), and Count IV charged that, on or about May 26, 1992, Ratliff distributed cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B).

The United States District Court for the Central District of Illinois had jurisdiction over the case pursuant to 18 U.S.C. § 3231, as well as 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 841(b)(1)(C).

Ratliff subsequently negotiated a written plea agreement with the United States. In it, Ratliff agreed to plead guilty to Counts III and IV of the indictment, and the government agreed to move for a dismissal of the first two counts, to recommend a two-level reduction in the base offense level, and to recommend a sentence at the low end of the applicable United States Sentencing Guideline ("USSG") range.

The Presentence Investigation Report ("PSR") recommended that certain drug dealing activities Ratliff allegedly engaged in, other than those to which he was pleading guilty, be considered as "relevant conduct" under USSG § 1B1.3. These included the following:

- Three separate cocaine sales that Ratliff made to various undercover agents on June 19, July 10, and October 10, 1991, in the amounts of $210, $1,500, and $100, respectively.

- A crack cocaine sale by an individual known as Kim Hughes to undercover agents on April 16, 1992, in which Hughes later told authorities that she was supplied the crack cocaine by the petitioner.[1]

- The attempted purchase of cocaine by Wallace and his co-conspirators at the Best Western Inn on April 28, 1992.

- Wallace's statement to the authorities that he had supplied Ratliff with approximately 1.425 kilograms of crack cocaine between late 1991 and April of 1992.

Ratliff objected to numerous paragraphs in the PSR. In particular, he took issue with the recommendation in the PSR that drug quantities attributable to certain prior acts, including activities involving Wallace, be categorized as "relevant conduct" in the district court's determination of a base offense level.

Although the government ultimately agreed to reduce the amount of cocaine attributable to Ratliff as a result of Wallace's statement, the district court rejected Ratliff's objection to the inclusion of the conduct involving Wallace, finding that Ratliff and Wallace conspired to sell cocaine until April of 1992, when

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[1] The PSR included the crack cocaine sold by Hughes within the amount attributed to Ratliff through his association with Wallace.

Wallace was arrested.[2] Accordingly, the district court sentenced Ratliff to 210 months on each of Counts III and IV, to be served concurrently. Had the court excluded consideration of those offenses involving Wallace in calculating the sentence, the applicable guideline range would have been between 100 and 125 months.

Ratliff appealed the district court's sentencing order, and the undersigned counsel were appointed to represent him on appeal. The Seventh Circuit affirmed the sentence, holding that Ratliff's alleged cocaine dealing activities as a co-conspirator with Wallace were "part of the same course of conduct or common scheme or plan" as the two crack cocaine sales that occurred after that conspiracy ended.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

THE COURT SHOULD GRANT RATLIFF'S PETITION FOR A WRIT OF CERTIORARI IN ORDER TO PROVIDE CLEAR LEGAL STANDARDS FOR THE APPLICATION OF USSG § 1B1.3(a)(2).

This Court should grant Ratliff's petition for a writ of certiorari in order to settle the important question of how to determine whether uncharged conduct constitutes "relevant conduct" for the purpose of applying § 1B1.3 of the United States Sentencing Guidelines. On this issue, the courts have acknowledged that the state of the law is unsettled and that there are no "bright-line" rules for defining a "course of conduct or common scheme or plan." *United States v. Lawrence*, 915

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[2] Although Ratliff's former counsel and the government stipulated to the quantity attributable to Ratliff as a result of Wallace's statement, there was no stipulation that the transactions with Wallace were "relevant conduct."

F.2d 402, 406 (8th Cir. 1990). *See also United States v. Sklar*, 920 F.2d 107, 111 (1st Cir. 1990) ("There is no available compass by which a judge can chart such boundaries with scientific precision.").

One of the main goals that Congress sought to achieve with sentencing reform was uniformity. By bringing uniformity to the federal system, the government hoped to eliminate disparity in the sentencing of similarly situated defendants. *United States v. Williams*, 980 F.2d 1463, 1467 (D.C.Cir. 1992); *United States v. Williams*, 891 F.2d 962, 963 (1st Cir. 1989). So long as the standards for measuring "relevant conduct" remain insufficiently defined, however, the strong interest in uniformity will be frustrated, and similarly situated defendants will continue to be sentenced to drastically different prison terms.

This problem is particularly acute in the "relevant conduct" area, due to the tremendous sentence-enhancing opportunities made available through "aggregation." Under the current sentencing system, prosecutors can convict defendants on easily provable and relatively minor offenses, then expand their sentences significantly by introducing evidence of more serious, yet uncharged, criminal offenses. *See, e.g., United States v. Ebbole*, 917 F.2d 1495, 1501 (7th Cir. 1990); *United States v. Fischer*, 905 F.2d 140, 142 (7th Cir.), *cert. denied*, 498 U.S. 969 (1990).

Under the "aggregation rule" of USSG § 1B1.3(a), the district court must increase a defendant's offense level to account for "relevant conduct." *United States v. Nunez*, 958 F.2d 196, 199 (7th Cir.), *cert. denied*, 113 S.Ct. 168 (1992). In a drug distribution case, "relevant conduct" includes all acts which were part of the "same course of conduct or common scheme or plan" as the offense of conviction, even if the defendant was never charged with or convicted of those acts. United States Sentencing Guideline §§ 1B1.3(a)(2); *United States v. Montgomery*, 14 F.3d 1189, 1197 (7th Cir. 1994).

In assessing whether other acts constitute the same "course of conduct or common scheme or plan," the courts have looked to the similarity, regularity, and temporal proximity of the acts to the offenses of conviction. *See, e.g., United States v. Beler*, 20 F.3d 1428, 1437 (7th Cir. 1994); *United States v. Bethley*, 973 F.2d 396, 401 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1323 (1993); *United States v. Mullins*, 971 F.2d 1138, 1144 (4th Cir. 1992). As this case illustrates, without more, these factors provide an insufficient basis for determining what constitutes a "course of conduct or common scheme or plan."

In its unpublished disposition of Ratliff's appeal, the Seventh Circuit used these factors to measure the crack cocaine sales for which Ratliff was convicted against the narcotics transactions that were the subject of the alleged conspiracy with Wallace and concluded that the district court did not err in finding the latter to be part of the same course of conduct as the former. In reaching this decision, the Seventh Circuit so departed from the intended application of the Sentencing Guidelines as to warrant action by this Court and the articulation of clear standards for defining "relevant conduct."

This case closely resembles *United States v. White*, 888 F.2d 490, 500 (7th Cir. 1989), a Seventh Circuit decision that correctly interpreted the Sentencing Guidelines. In *White*, one of the defendants was charged in separate counts with taking part in a conspiracy from January to May of 1986, with selling cocaine to an informant in May of 1988, and with discussing another sale of cocaine to that informant in June of 1988. *Id.* at 500. Although the defendant pled guilty only to the second count, the district court calculated his sentence by including the amount of drugs involved in all three counts. *Id.*

On appeal, the Seventh Circuit vacated the sentence, finding that, under the indictment's own terms, the 1986 conspiracy was not part of the same course of conduct or common scheme or plan as the 1988 offenses. *Id.* In the court's view, there

were two critical distinctions between the 1986 conspiracy and the drug transaction which served as the basis of the conviction: The defendant's sources of cocaine in 1988 were not the 1986 conspirators, and the customers differed. *Id.* The Seventh Circuit held that these differences precluded a determination that the earlier conspiracy was part of the "same course of conduct or common scheme or plan" as the later offenses. *Id.*

The Seventh Circuit reaffirmed the teachings of *White* in *United States v. Duarte*, 950 F.2d 1255 (7th Cir. 1991), *cert. denied*, 113 S.Ct. 174 (1992). In *Duarte*, the defendant was convicted of conspiracy and possession offenses arising from his role in the distribution of slightly more than one kilogram of cocaine. Under the aggregation rule, however, the trial court nearly doubled his sentence because a ledger note contained in his wallet at the time of arrest indicated that he was responsible for the distribution of more than five kilograms of cocaine. *Id.* at 1262.

On appeal, the Seventh Circuit vacated the sentence and held that the trial judge lacked sufficient basis to conclude that the cocaine distribution evidenced by the ledger note was part of the same course of conduct or common scheme or plan as the offenses for which he was convicted. *Id.* at 1264-65. The court noted that the record lacked sufficient evidence to show that the defendant's other drug dealing was part of the same conspiracy, involved similar parties, or occurred in the same time frame. *Id.* at 1264.

White and *Duarte* both conclude that aggregation is not warranted simply because the alleged "relevant conduct" involved offenses of the "same kind" as those serving as the basis of the conviction. *White*, 888 F.2d at 500; *Duarte*, 950 F.2d at 1264. Instead, these cases hold that, in determining whether other drug distribution activities are part of the "same course of conduct or common scheme or plan," the sentencing court should look to whether the acts were part of the same conspiracy and whether the defendant's customers and sources were the same.

By contrast, in Ratliff's case, the Seventh Circuit adopted a different approach and, in so doing, misapplied the Sentencing Guidelines. The Seventh Circuit upheld the trial court's decision to include Ratliff's alleged activities with Wallace as "relevant conduct" to his conviction on unrelated charges. The evidence presented at sentencing, however, indicated that all of the petitioner's activities involving Wallace were undertaken as part of a conspiracy, and there is no evidence that this conspiracy continued after Wallace's arrest at the Best Western Inn in April of 1992. Moreover, it was also undisputed at sentencing that the customers involved in the transactions that constituted the conspiracy with Wallace differed from those in the transactions for which Ratliff was convicted.

Moreover, the Seventh Circuit ignored the significant differences between Ratliff's activities with Wallace and the activities for which he was convicted. The drug transactions to which Ratliff pled guilty involved comparatively small amounts of drugs which he sold at street level for his own benefit. By contrast, the transactions involving Wallace involved larger quantities of drugs and called for Ratliff to perform functions essential to the conspiracy (*e.g.*, acting as a "lookout" during a drug transaction).

The Seventh Circuit plainly erred in its attempts to refute this crucial difference. It cited the language of USSG § 1B1.3(a)(2) for the proposition that, because "relevant conduct" includes "*all* acts and omissions" that are part of the "same course of conduct" (emphasis added), no distinction need be made on the basis of the kinds of acts engaged in by the defendant. (A6). This reasoning begs the question, however, because it presumes the existence of a single "course of conduct or common scheme or plan" encompassing the acts of conviction and the alleged "relevant conduct, " the very question at issue.

The Seventh Circuit alternatively held that aggregation was required on the ground that "relevant conduct" under USSG § 1B1.3(a)(1)(B) includes "all reasonably foreseeable acts and omissions of others in furtherance of jointly undertaken criminal activity[.]" (A7). However, the Seventh Circuit failed to consider the final clause of § 1B1.3(a)(1)(B), which qualifies the section's applicability to criminal activity "that occurred *during the commision of the offense of conviction[.]*" USSG § 1B1.3(a)(1)(B) (emphasis added). Here, neither of the offenses for which Ratliff was *convicted* involved joint activity by Wallace. Because USSG § 1B1.3(a)(1)(B) is wholly inapplicable, the Seventh Circuit's reasoning is wrong. *See United States v. Wood*, 924 F.2d 399, 404, n.2 (1st Cir. 1991) (liability for acts of co-conspirator limited to acts that occurred during the commission of the offense of conviction).

Accordingly, the Seventh Circuit erred in holding that the activities involving Wallace constituted "relevant conduct" for sentence aggregation purposes. The absence of clear standards for defining "relevant conduct" resulted in at least an 85 month increase in the length of Ratliff's sentence. This is hardly unusual, however, as errors in assessing "relevant conduct" will frequently account for significant differences in sentencing, due to the substantial power of aggregation. For example, in *Duarte*, 950 F.2d at 1262, the Seventh Circuit's holding that evidence of other offenses did not rise to the level of "relevant conduct" resulted in a sentencing decrease of more than seven years.

Given the absence of clear legal standards for defining "relevant conduct," it is not surprising that both the district court and the Seventh Circuit misapplied the Sentencing Guidelines. Had the standards been clearly defined, Ratliff would likely have received a sentence at least seven years shorter than the one he is currently serving. Clearly, this is not the type of sentencing uniformity that Congress contemplated.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: March 7, 1995

APPENDIX

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ORDER, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS A9

attempted possession of cocaine with intent to distribute on April 28, 1992 (Count II), distribution of cocaine on May 21, 1992 (Count III), and distribution of cocaine on May 28, 1992 (Count IV).[1] Ratliff pleaded guilty to Counts III and IV, the government dismissed Counts I and II, and a date was set for sentencing.

A presentence report was prepared by a U.S. Probation Officer. That report contained evidence that Ratliff had periodically sold drugs to undercover agents or cooperating individuals from June 19, 1991 to May 26, 1992.[2] All of these sales took place in Springfield, Illinois. It also contained a statement given by Kent Wallace, one of Ratliff's coconspirators, describing Ratliff's role in a conspiracy to distribute cocaine and cocaine base. Specifically, Wallace said that he had fronted crack cocaine to Ratliff and others in $500.00 or $1,000.00 portions, and that he had supplied Ratliff with about 1-1/2 kilograms of cocaine between late 1991 and early 1992. Wallace also said that Ratliff had been his accomplice during a drug buy that took place at the Best Western Inn in Springfield, Illinois on April 28, 1992. That drug buy was actually a reverse sting operation conducted by the Drug Enforcement Agency (DEA) which culminated in the arrest of Wallace and others. After Wallace was taken into custody, he told police that Ratliff was at the scene to provide security.

In fact, DEA agents had stopped Ratliff when they noticed that he was driving around the parking lot during their operation, but had released him after questioning. When the

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[1] Each count alleged a violation of 21 U.S.C. § 841 and § 846, and 18 U.S.C. § 2.

[2] The report stated that Ratliff sold drugs to government agents or cooperating individuals on June 6, 1991, July 7, 1991, November 10, 1991, April 18, 1992, May 21, 1992, and May 26, 1992.

agents first ordered Ratliff to stop he sped away to another part of the parking lot even though they were dressed in DEA raid uniforms and had their red lights activated. Unfortunately for Ratliff, he fled to a part of the parking lot with no outlet and was forced to return to the area where the DEA agents were wrapping up their sting operation. This time Ratliff stopped and, upon request, gave the agents permission to search his car. The agents found a scanner that was set to scan two channels used by the Springfield Police Department. A scanner found in Wallace's car had also been set to scan those same two channels. Wallace had purchased both scanners. According to the presentence report, Ratliff later told a cooperating individual that he and Kent Wallace had tried to purchase a kilo of cocaine, but the police had shown up and blown the deal. The presentence report recommended that Ratliff's activities with Wallace be considered for sentencing purposes.

Ratliff denied Wallace's statements at his sentencing hearing, although he presented no evidence to support his bare denials. Ratliff asserted that he was at the Best Western to rent a room, not to serve as security on April 28, 1992.[3] Ratliff also denied that Wallace had sold him 1½ kilograms of cocaine. Significantly, Ratliff did not deny buying drugs from Wallace; he merely argued that Wallace had sold him only 7 or 8 ounces of cocaine during the "relevant time period." This dispute was settled when Ratliff stipulated — on no less than four occasions — that he had received 7 to 8 ounces of crack cocaine from Wallace and had later distributed those drugs.

The district court found that Ratliff's actions in furtherance of his conspiracy to distribute cocaine were relevant conduct

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[3] Given the government's overwhelming evidence of his participation in this drug transaction, even Ratliff admitted that this was not a serious dispute. See Transcript from Sentencing Proceedings, January 25, 1994, pp. 11-12.

and included drugs related to those activities when calculating his sentence. Specifically, the court included the 8 ounces of cocaine that Ratliff admitted receiving from Wallace and distributing thereafter as well as the kilogram of cocaine that Ratliff and his coconspirators tried to purchase on April 28, 1992. Ratliff now argues that the small-scale drug distribution counts to which he pleaded guilty "stand in sharp contrast" to the allegedly larger amounts of drugs he received as Wallace's coconspirator and his service as a lookout during the April 28, 1992 drug purchase. Thus, the argument goes, his actions in furtherance of his conspiracy to distribute cocaine are not relevant conduct, and therefore, the district court erred when it considered drugs attributed to these activities for the purpose of calculating his sentence.

II. Analysis

In order for uncharged conduct to be considered for sentencing purposes, that conduct must be part of the same "course of conduct, common scheme or plan as the offense of conviction." United States Sentencing Guidelines (USSG) § 1B1.3(a)(2). In this case Ratliff's guilty plea on the distribution counts constitutes the offense of conviction. Therefore, we must determine whether Ratliff's actions in furtherance of his conspiracy with Wallace and others to distribute cocaine were "part of the same course of conduct or common scheme or plan" that gave rise to his conviction for the distribution of crack cocaine. *Id.*

The relevant conduct provision of the Guidelines authorizes courts to consider a pattern of misconduct that cannot readily or meaningfully be broken into discrete, identifiable units when sentencing a defendant. *United States v. Sykes*, 7 F.3d 1331, 1335 (7th Cir. 1993) (citations omitted). In order for conduct to be considered relevant, however, there must be a pattern; conduct does not become relevant merely because it is similar. *Id.* at 1336. Thus, "a court must consider whether

there are distinctive similarities between the offense of conviction and the remote conduct that signal that they are part of a single course of conduct rather than isolated, unrelated events that happen only to be similar in kind." *Id.* Our inquiry focuses on the similarity, regularity and temporal proximity of the uncharged acts to the offense of conviction. *Id.* Relevant considerations include whether similar parties were involved in each transaction, the geographical relationship, and any other relationship between the offense of conviction and the relevant conduct. *United States v. Wilson*, 31 F.3d 510, 516 (7th Cir. 1994).

We affirm the district court's sentencing decision if it correctly applied the Guidelines to findings of fact that were not clearly erroneous. *United States v. Montgomery*, 14 F.3d 1189, 1196 (7th Cir. 1994). The district court's determination that uncharged conduct constitutes relevant conduct is a finding of fact. *United States v. Nunez*, 958 F.2d 196, 198 (7th Cir. 1992); *Sykes*, 7 F.3d at 1335. A factual finding is clearly erroneous if it leaves a reviewing court with a definite and firm conviction that a mistake has been committed. *United States v. Rivera*, 6 F.3d 431, 444 (7th Cir. 1993). In this case, Ratliff's challenge to the trial court's factual determination is a mere denial, and therefore, he must show that the government's charge is naked or unsupported. *Rivera*, 6 F.3d at 445. Ratliff made no such showing.

The district court found that Ratliff's actions evidenced a pattern of regular drug distribution. The record shows that Ratliff periodically sold cocaine to government agents or cooperating individuals from June 1991 through May 1992. Wallace stated that Ratliff had sold cocaine for him from 1991 through 1992, and the government showed that Ratliff was cooperating with Wallace, one of his coconspirators, at least as late as April 28, 1992. Ratliff admitted that he sold 7 to 8 ounces of cocaine which he had received from Wallace and his attorney conceded that this activity took place during the relevant time

period. The district court's finding of regularity is supported by the evidence; it is not clearly erroneous.

Ratliff's argument that these activities were not regular is incredible. Apparently he thinks that the government must prove that he sells drugs with clock-like precision in order to establish the requisite degree of regularity. Quite the contrary, the government's evidence allowed the district court to infer that Ratliff was selling drugs regularly throughout 1991 and 1992. See *United States v. Cedano-Rojas*, 999 F.2d 1175, 1180-81 (7th Cir. 1993) (evidence sufficient to support district court's finding that defendant continued to deal drugs throughout two-year period); *United States v. Montgomery*, 14 F.3d 1189, 1198 (7th Cir. 1994) (same); *United States v. Nunez*, 958 F.2d 196, 198-99 (7th Cir. 1992) (same). Ratliff's failure to introduce evidence rebutting this inference further supports the district court's finding. See *Rivera*, 6 F.3d at 445; *United States v. Crawford*, 991 F.2d 1328, 1331 (7th Cir. 1993).

The district court also found that Ratliff's actions in furtherance of his conspiracy to distribute cocaine were similar to the street-level sales to which Ratliff pleaded guilty. The record shows that Ratliff's sales to government agents or cooperating individuals were street sales involving relatively small quantities of drugs. Wallace said that Ratliff had sold cocaine for him in 1991 and 1992, and Ratliff admitted selling 7 or 8 ounces of cocaine which he obtained from Wallace. All the sales took place in Springfield, Illinois. This evidence allowed the district court to infer that Ratliff was engaged in street-level sales of small quantities throughout this period. The district court's finding of similarity is supported by the evidence; it is not clearly erroneous.

Ratliff's effort to examine separately his different roles as a conspirator (*e.g.* "lookout" and "distributor") is also incredible. Such an approach defies common sense and the language of Section 1B1.3 which requires that we consider "*all* acts and omissions ... *that were part of* the same course of conduct or common scheme or plan." USSG § 1B1.3(a)(2); See also

Rivera, 6 F.3d at 445 (evidence supported district court's finding that drug deliveries were part of the same course of conduct despite contention that drugs were delivered in furtherance of a different conspiracy). At any rate, such an analysis would not benefit Ratliff because relevant conduct includes "all reasonably foreseeable acts and omissions *of others* in furtherance of the jointly undertaken criminal activity." *See* USSG § 1B1.3(a)(1)(B). *See also Crawford*, 991 F.2d at 1330-31 (it is not necessary that defendant be convicted of conspiracy to be held accountable for drugs negotiated, bought or sold by other persons.); *Rivera*, 6 F.3d at 445 (accord).

Finally, the district court found that there was sufficient "temporal proximity" between Ratliff's activities as a coconspirator and the offenses of conviction, because all these activities fell between June of 1991 and May 1992. *See Sykes*, 7 F.3d at 1336. These acts evince sufficient temporal proximity to be considered for sentencing purposes. See *Cedano-Rojas*, 999 F.2d at 1180-81 (drug transactions two years prior to offense of conviction still relevant conduct); *Nunez* 958 F.2d at 198-99 (same). The district court's finding of temporal proximity is supported by the evidence; it is not clearly erroneous.[4]

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[4] This showing of "similarity, regularity, and temporal proximity," *U.S. v. Montgomery*, 14 F.3d at 1198, distinguishes Ratliff's case from those he mistakenly relies upon. For example, only one month elapsed between Ratliff's participation as a coconspirator in the April 28, 1992 drug purchase and his offense of conviction, whereas in both *White* and *Beler* there was a two-year lapse between the offense of conviction and the conspiracy that accounted for drugs which the court had considered for sentencing purposes. *United States v. White*, 888 F.2d 490, 500 (7th Cir 1989); *United States v. Beler*, 20 F.3d 1428, 1437 (7th Cir. 1994). This proximity in time as well as similarity in kind (street-level distribution of small quantities) and location (Springfield, Illinois) also distinguishes Ratliff's case from *Duarte* where there was no evidence that drugs included for sentencing purposes had been sold in the same geographic area, or that those sales were close in time. *United States v. Duarte*, 950 F.2d 1255, 1264-65 (7th Cir. 1991).

Ultimately, Ratliff's argument rests on his contention that the distribution of drugs for a conspiracy is different from the small-scale "entrepreneurial" drug sales that led to his conviction. We reject Ratliff's argument for two reasons. First, the district court's findings are supported by the evidence, and indeed, there is no evidence in the record that Ratliff's activities were "isolated, unrelated events that happen only to be similar in kind." *Sykes*, 7 F.3d at 1336; *Rivera*, 6 F.3d at 445. Second, Ratliff's argument rests on the very "charge offense" theory that Section 1B1.3 is designed to modify in favor of "real offense" sentencing. *See United States v. White*, 888 F.2d 490, 496-97 (7th Cir. 1989).

For the foregoing reasons, we

AFFIRM.

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 93-30059
	)	
MICHAEL RATLIFF,	)	
	)	
Defendant.	)	

ORDER

RICHARD MILLS, District Judge:

This cause is before the Court on Defendant's sentencing. Defendant pled guilty to two counts of distribution of cocaine base. The United States has raised no objections to the Presentence Report. Defendant, however, has raised several objections.

The Court points out that "a defendant who challenges factual allegations in the PSR [presentence report] has the burden of producing some evidence beyond a bare denial that calls the reliability or correctness of the alleged facts into question." *United States v. Rivera*, 6 F.3d 431, 444 (7th Cir. 1993) (citing *United States v. Isirov*, 986 F.2d 183, 185 (7th Cir. 1993)). "The burden of convincing the court that the PSR facts are true only shifts back to the prosecutor if the defendant carries his burden of production." *Id.* at 445 (citing *Isirov*, 986 F.2d at 186).

Objections by the Defendant.

Relevant Conduct

Defendant objects to paragraphs 8, 9, and 10 of the PSR. These paragraphs hold Defendant accountable for 26.8 grams of powder cocaine. This cocaine was purchased from Defendant by undercover agents working for the Central Illinois Enforcement Group and the Illinois State Police, Division of Criminal Investigation. Defendant argues that the cocaine in question is not part of the offense conduct and cannot properly be attributed to him as relevant conduct.

"Whether the transactions are part of the same course of conduct as the offense of conviction depends upon the similarity, regularity and temporal proximity of the incidents in question." *United States v. Cedano-Rojas*, 999 F.2d 1175, 1180 (7th Cir. 1993). In the case at bar, the transactions in question are very similar to the offense of conviction. The three transactions described in paragraphs 8, 9, and 10 all involved street level drug buys between undercover agents and Defendant. The drug sales Defendant pled guilty to also involved street level buys conducted by undercover agents. All of these events took place on the east side of Springfield. *See Id.* at 1181 (in determining if prior drug transactions constituted relevant conduct appellate court looked to the fact that all of the transactions took place in Chicago). The only difference between the transactions described in paragraphs 8, 9, and 10 and the offenses of conviction is that the prior sales involved powdered cocaine and the later involved crack. Distinguishing between the types of cocaine sold can hardly be a distinction warranting a finding that the three incidents are not relevant conduct.

According to the PSR, Defendant was clearly selling cocaine regularly. The PSR indicates five specific sales of cocaine to undercover agents from the time period of June 1991 until May of 1992. Furthermore, in paragraph 17 of the PSR Kent

Wallace, an individual under arrest for attempting to purchase cocaine, stated that Defendant had been selling cocaine for him from late 1991 through April 1992 when Mr. Wallace was arrested. These facts indicate that Defendant was regularly selling cocaine during the time between June 1991 when he first sold cocaine to an undercover agent until May of 1992 when he was arrested for again selling cocaine to undercover agents.

The temporal proximity of the incidents is strong. The time lapse from the cocaine sales outlined in paragraphs 8, 9, and 10 and the offenses of conviction was eleven months. During these eleven months Defendant was actively selling cocaine. The Seventh Circuit has affirmed findings of relevant conduct when the gap in time between the prior conduct and the offense of conviction was two years. *United States v. Nunez*, 958 F.2d 196, 198 (7th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 168 (1992). In *Nunez*, there had been a complete gap in sales during the two-year interval. In this case there is only eleven months separating the transactions in question plus during those eleven months Defendant continued to actively sell cocaine.

The Court finds that the similarity, regularity and temporal proximity of the incidents in question supports a finding that the drug quantities listed in paragraphs 8, 9, and 10 of the PSR are relevant conduct under § 3B1.1(a)(2). Defendant's objection to paragraphs 8, 9, and 10 is, therefore, denied.

Defendant also objects to paragraph 11 of the PSR which holds him accountable for the sale of 8.9 grams of crack cocaine. Paragraph 11 details the sale of crack cocaine to undercover agents working for the Illinois State Police and the Illinois Secretary of State Police. The two undercover agents purchased the crack cocaine from Sheila Wills and Kim Hughes. These two women informed the agents that their source was the Defendant. Ms. Hughes also gave this information to the police in an investigation report conducted by the U.S. Attorney's Office as part of a cooperation agreement.

As stated earlier, it is Defendant's burden to prove that the facts contained in the PSR are incorrect. This burden requires more than mere allegations that the PSR is false. Defendant's objection states "defendant categorically denies any involvement with Ms. Hughes and insists she never obtained any drugs from him." This bare denial is inadequate to meet Defendant's burden of producing some evidence that calls the reliability or correctness of the alleged facts into question. *See Rivera*, 6 F.3d at 444. Defendant's objection to paragraph 11 is, therefore, denied.

Defendant also objects to paragraphs 12, 13, and 14 of the PSR which hold him accountable for one kilogram of cocaine. The kilogram in question was involved in a reverse sting operation set up by the DEA. Three individuals, Willis Gragg, Ron Williams, and Kent Wallace were arrested at the Best Western Inn on Stevenson Drive in Springfield, Illinois. These three individuals attempted to purchase a kilogram of cocaine from DEA agents. While the sting operation was in progress, DEA agents noticed a car driving slowly around the parking lot of the hotel near the area of the arrest. The DEA agents ordered the driver of the car, Defendant, to stop. Defendant sped away to the northeast corner of the parking lot, out of sight of the DEA agents. This part of the parking lot turned out to be a dead end, forcing Defendant to turn around and face the DEA agents.

Defendant gave verbal and written consent to search his vehicle. The DEA agents found a cellular phone, a police scanner which was set to scan two Springfield Police Department frequencies, and a digital pager. Defendant claimed he was in the parking lot because he intended to get a room.

Shortly after Kent Wallace was arrested he told DEA agents that Defendant had been present in the parking lot of the hotel for security and protection purposes. Furthermore, the confidential source who bought the drugs from Defendant in

the transactions which led to Defendant's arrest gave a statement to law enforcement agents in which he stated that Defendant told him that he and Kent Wallace tried to buy a kilogram of cocaine but the police showed up.

Again Defendant fails to produce any evidence beyond a bare denial that calls the reliability or correctness of the PSR into question. The PSR lists two independent sources that indicate Defendant was participating in the sale of the kilogram of cocaine. Furthermore, Defendant was at the scene of the purchase with several items which are commonly used in trafficking drugs. Defendant has failed to produce any evidence to call these facts into question. Defendant merely states he was in the parking lot to rent a room. Defendant has failed to meet his burden of calling the facts of the PSR into question. Accordingly, Defendant's objection to paragraphs 12, 13, and 14 is denied.

Defendant also objects to paragraph 17 of the PSR. This paragraph holds Defendant accountable for 1,425 grams of crack cocaine. This amount was obtained by the U.S. Probation Office through an interview of Kent Wallace. In this interview, Mr. Wallace stated that Defendant had been selling cocaine for him from late 1991 until April of 1992 when Mr. Wallace was arrested. Mr. Wallace stated that a conservative estimate of the amount of cocaine sold by Defendant was one and a half kilograms, 95% of which was distributed in the form of crack cocaine.

Defendant admits to receiving 7 to 8 ounces of crack cocaine from Mr. Wallace but denies that he received any amount of cocaine in excess of the 7 to 8 ounces. The government has agreed to accept Defendant's statements over those of Mr. Wallace. Accordingly, Defendant's objection to paragraph 17 is allowed. Paragraph 17 of the PSR should be amended to show that Defendant received 7 to 8 ounces of crack cocaine from Mr. Wallace.

Total Amount of Cocaine Attributable to Defendant

Defendant objects to paragraph 18 of the PSR which summarizes the amount of cocaine for which Defendant is being held accountable. Defendant argues that based on his previous objections, this paragraph is inaccurate. In light of the Court's ruling on Defendant's objection to paragraph 17 of the PSR paragraph 18 is inaccurate. Paragraph 18 should hold Defendant accountable for 198.45 grams of crack cocaine in paragraph 17 and for a total amount of 210.34 grams of crack cocaine.

Base Offense Level

Defendant objects to paragraph 24 of the PSR which sets his base offense level at 36. Defendant argues that based on his previous objections, this paragraph is inaccurate. Based on the previous ruling of the Court, this objection is allowed. Paragraph 24 should set Defendant's base offense level at 34.

Prior Convictions Related Cases

Defendant objects to paragraphs 41 and 42 of the PSR. Paragraph 41 details Defendant's arrest and sentencing for the offense of tampering with a motor vehicle to which Defendant pled guilty. Paragraph 42 details Defendant's arrest and sentencing for the offense of operating a motor vehicle without the owner's consent to which Defendant pled guilty. Defendant argues that these are related cases since they were prosecuted and disposed of by a single plea.

U.S.S.G. § 4A1.2 application note 3 states that prior sentences are not considered related if they were for offenses that were separated by an intervening arrest. Court documents supplied by the U.S. Probation Office, Eastern District of Missouri, St. Louis, indicate that Defendant was arrested for the first offense outlined in paragraph 41, released on bond, and then arrested for the second offense outlined in paragraph 42. These

two convictions were separated by an intervening arrest and therefore are not considered related. Accordingly, Defendant's objection to paragraphs 41 and 42 are denied.

Defendant also objects to paragraphs 45 and 46 of the PSR. These two paragraphs set out Defendant's conviction of two separate counts of operating a motor vehicle without the owner's consent. Although these convictions were for two separate offenses, the two charges were consolidated for sentencing. Defendant argues that under § 4A1.2 application note 3 these two offenses must be treated as related offenses. Given the Seventh Circuit's recent ruling in *United States v. Harris*, 994 F.2d 412 (7th Cir. 1993), Defendant's objection must be allowed. Accordingly, the offense outlined in paragraphs 45 and 46 should be counted as one sentence.

Unrepresented Misdemeanor

Defendant objects to paragraph 48 of the PSR. This paragraph adds one point to Defendant's criminal history category for a previous conviction. Defendant pled guilty to retail theft in Sangamon County Circuit Court. Defendant argues that this conviction should not be counted because he was not represented by an attorney and did not validly waive his right to an attorney.

Whether or not Defendant was represented by counsel when he pled guilty to this offense is irrelevant. Section 4A1.2, comment. (backg'd), states that "prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed." The offense in question in paragraph 48 was a misdemeanor and Defendant received a fine. Defendant's objection to paragraph 48 is, therefore, denied.

Prior Sentence

Defendant objects to paragraph 52 of the PSR. This paragraph adds a point to Defendant's criminal history for his plea of guilty in Sangamon County Circuit Court for possession of a controlled substance. Defendant argues that this conduct occurred after the conduct that forms the offense of conviction in this case and therefore cannot be counted as a prior sentence.

The government concedes that under U.S.S.G. § 4A1.2 application note 1 this conviction was part of the instant offense and, therefore, cannot be counted as a prior sentence. Accordingly, Defendant's objection to paragraph 52 is allowed.

Representation by an Attorney

Defendant objects to paragraph 53 of the PSR. This paragraph adds one point to Defendant's criminal history for his plea of guilty in state court for criminal trespass to land. Defendant claims that he was not represented by counsel and did not give a sufficient waiver of counsel.

The burden of showing that a prior conviction is constitutionally invalid is on the Defendant. *United States v. Boyer*, 931 F.2d 1201, 1204 (7th Cir. 1991). The only evidence to support Defendant's claim that the prior conviction is unconstitutional is Defendant's claim that he did not waive his right to an attorney. Illinois Supreme Court Rule 401 states that the court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first informing the defendant of his right to counsel. Furthermore, Jeanne Scott, Chief Judge, Seventh Judicial Circuit, Sangamon County, Illinois, has stated to the U.S. Probation Office, Central District of Illinois, Springfield Division, that it is standard practice to advise defendants of their right to counsel. Defendant has failed to meet his burden of establishing that his prior

conviction was unconstitutional. Accordingly, Defendant's objection to paragraph 53 is denied.

Criminal History Computation

Defendant objects to paragraph 54 which contains his criminal history computation. Defendant argues that based on his previous objections, this paragraph is inaccurate. Based on the Court's allowance of Defendant's objection to paragraphs 45, 46, and 52, this paragraph is inaccurate. Defendant's criminal history computation should be 16. This adjustment has no effect on Defendant's sentence, however, as 13 or more criminal history points establish a criminal history category of VI. Defendant's criminal history computation of 15 still places him in criminal history category VI.

Applicable Guideline Range

Finally, Defendant objects to paragraph 77 of the PSR which sets out his applicable guideline range. Defendant argues that based on his previous objections, this paragraph is inaccurate. Based on the Court's previous rulings, this objection is allowed. Paragraph 77 is amended to read that based on an offense level of 32 and criminal history of VI, the guideline range of imprisonment is 210 to 262 months.

Ergo, the applicable sentencing guideline range is:
Total offense level: 32
Criminal history category: VI
Imprisonment range: 210 to 262 months
Supervised release range: 8 years; U.S.S.G. § 5D1.2(a)
Fine Range: $17,500 to $6,000,000.

There is a special assessment of $100 pursuant to 18 U.S.C. § 3013.

RICHARD MILLS
United States District Judge